

State Integrity 2012

A campaign finance free-for-all in South Carolina

Federal judge's ruling has opened the gates for election spending with no disclosure

By Corey Hutchins  6:00 am, June 15, 2012 Updated: 5:19 pm, October 13, 2015



Charleston Mayor Joseph P. Riley Jr. celebrates his election to a ninth term in 2007. Despite being pummeled by an anonymous group that funded negative TV ads, flyers and a website, Riley was sworn in for a 10th term in January 2012. Alice Keeney/AP

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Longtime Charleston Mayor Joe Riley had run a lot of high-minded races in this coastal city known for charm and manners, so nothing really prepared him for the bare-knuckle politics he faced in a re-election bid last fall. A shadowy group popped up seemingly out of nowhere and spent an untold amount of secret money to pummel Riley's record in support of one of his rivals.

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None of the mayor's opponents declared allegiance to the anonymous group that funded TV ads, flyers and a slick website called "**The Riley Files**" that read like a private investigator's report. The website came complete with images of manila folders titled "Crony Capitalism" and "Misplaced Priorities" along with photos of the mayor paper-clipped to them.

No one ever found out who was behind the group calling itself Citizens for a Better Charleston. That's because new rules in South Carolina meant the group did not have to file paperwork with the state or disclose what it was doing, how much it was spending, where its money was coming from and who was bankrolling it.

The mayor won his re-election campaign, but the victory came with a few bruises — and a lesson: in the realm of money and politics, things had changed dramatically in the Palmetto State.

In the past, an independent entity attempting to influence an election — like Citizens for a Better Charleston — would have had to file disclosure paperwork as a "committee" with the state's ethics agency, allowing a bit of sunlight to shine on its work.

But not anymore.

In 2010, a little-noticed **ruling** by U.S. District Court Judge Terry Wooten in Florence, S.C., kicked the regulatory teeth out of a key statute in the state's campaign finance laws and opened the floodgates for untraceable political spending by many of the groups seeking to influence elections.

The case revolved around a seemingly mundane sliver of minutiae — how the word "committee" is defined under South Carolina law. But the effects of Wooten's ruling were far-reaching indeed, and that's likely just how famed conservative lawyer James Bopp — the star of the case — wanted it. In the Palmetto State, suddenly all bets were off when it came to independent expenditures meant to influence elections. And they still are.

"Until we clarify it, it's the Wild West to a certain extent," says **Wes Hayes**, a Republican lawmaker who chairs the S.C. Senate Ethics Committee. "Until we get that clarified we have no law."

State legislators, ethics regulators and good government groups here haven't yet been able to put back the pieces — not in last year's legislative session, and not in the one just finished either.

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Unless and until they do, many worry that South Carolina will remain in a state of anarchy in regard to secret money and its effect on campaigns — with a high-stakes election just five months away.

Past as present

The series of events that turned campaign finance upside down here began in 1998. That's when a big bet by a band of power brokers in the state's video poker industry — a bet totaling millions in secret money — vanquished a sitting Republican governor, David Beasley, who opposed video poker.

Back then, there was no state law requiring groups to report independent expenditures designed to influence an election. And so the pro-video-poker forces unmercifully criticized Beasley with TV, radio and newspaper ads, billboards, phone banking and bumper stickers. According to a *USA Today* report, the industry spent \$3 million on the race — most of it soft money that did not have to be disclosed. And Beasley lost big.

In the wake of that notorious election, the S.C. Supreme Court abolished video poker in the state — and lawmakers tightened up the disclosure requirements for independent campaign expenditures. The new rules mandated that any group seeking to influence an election — “committees,” they called them — must disclose its political spending.

Things seem pretty settled until 2006, when a lawsuit challenging the status quo was initiated by South Carolina Citizens for Life, an anti-abortion group with a colorful history of punching holes in state campaign finance statutes.

The pro-life advocacy organization had wanted to mail out a voter guide for a legislative race, and it worried that by doing so it might run afoul of the state's campaign finance laws. The group, court records show, was worried that by sending out the voter guide it would have to register with the state as a “committee,” and be subject to filing expenditure reports or risk criminal or civil penalties.

So before sending out the voter guide, the group asked the State Ethics Commission if doing so would be legal. The ethics agency said it would have to discuss the question at a meeting of its commissioners, but the meeting would not have been held until after the election. And so, with assistance from conservative hero Bopp, the Indiana attorney whose arguments were at the root of the Supreme Court's landmark *Citizens United* decision, the pro-life group sued the State Ethics Commission.

At its heart, the lawsuit “challenges the constitutionality of applying political action committee (‘PAC’) regulations to organizations that have the major purpose of advocating on behalf of issues,” rather than candidates, Bopp said

in an Oct. 5, 2006 **statement**.

After four years of litigation that found the case traveling to the Fourth Circuit Court of Appeals in Richmond, Va., before being remanded back down to South Carolina, Judge Wooten essentially agreed with Bopp.

And back in South Carolina, on Sept. 13, 2010, Wooten wrote, “This Court concludes that the committee provisions of the South Carolina Ethics Act at issue simply sweep too far.”

Herbert Hayden, director of the **State Ethics Commission**, says it was as if the judge had used a pair of scissors to cut the word “committee” out of the state’s ethics laws.

While money given directly to political candidates must still be reported, and those contributions are still subject to limits, when it comes to non-candidate committees, the bottom line, according to Hayden, is that with no ‘committee provisions,’ the ethics laws are essentially moot relating to the disclosure of political groups trying to influence elections.

“Any organized group ... can raise and spend any money that they want to,” Hayden says. “They are not limited [as] to the amount of money they can accept, they are not limited [as] to the amount of money that they can spend, and they are not required to disclose where the money came from or how they spent it.”

And that includes the state’s political parties.

Thinking it through

None of those effects, though, were immediately clear. The judge’s ruling went largely unnoticed even within the state’s clubby political world. Even the parties to the lawsuit didn’t appear to understand the implications. The first mention of the decision in the press, published in *The State* newspaper more than a month later, noted that the chairmen of both the S.C. House and S.C. Senate ethics committees, which regulate the campaign finances of current and former lawmakers, were unaware of what had transpired.

But a few others were not. Working with Bopp as local counsel in the case were two Columbia-based election lawyers, Kevin Hall and Butch Bowers, whose clients also included the South Carolina Republican Party. Shortly after the ruling, the state GOP began taking in larger donations into its campaign account than were previously allowed.

Before the ruling, corporations and individuals could only give \$3,500 to a party campaign account. But in the month after the ruling, the GOP took

\$20,000 from a state-based school choice advocacy group and \$10,000 from a PAC — the Palmetto Leadership Council — with ties to the House speaker, Republican Bobby Harrell.

When the State Ethics Commission's general counsel, Cathy Hazelwood, saw that the party was taking in such large and unprecedented donations into its campaign account, she was stunned.

“We thought it was illegal,” she said.

Turns out it wasn't.

Attorney Bowers, who was working for the party, explained to Hazelwood that the state GOP was simply taking advantage of the new court decision that had abolished committees in the South Carolina Citizens for Life case. After a bit of reflection, Hazelwood had to agree; under the Wooten decision, the GOP's actions were legal.

Hazelwood never imagined the ruling would have such implications.

“That was shortsighted on my part because I should have known that somebody is going to look for an angle, [that] there will be an angle to be played in this,” she said. “And they played it first.”

Bowers did not respond to requests for comment.

Since then, others have caught on, and no one has taken advantage more aggressively than that stealth group opposing Mayor Riley in Charleston. Its only disclosure:

“Paid for by Citizens for a Better Charleston. Not authorized by any candidate or committee.”

One of the group's flyers supporting a Riley opponent was partly written in the first person, though the candidate it seemed to be coming from said he had nothing to do with it.

The mayor went on to an easy win, but not before condemning the use of that “secret committee” to attack him. Others echoed the mayor's thoughts. Laurel Suggs, who has tracked campaign finance issues for the **League of Women Voters of South Carolina** for years, calls it a “terrible thing” that the public can't know who or what entity is behind anonymous advertising campaigns.

And, she believes, it's led to a decrease in the number of folks willing to take part in the democratic process in South Carolina.

“Open elections are being undermined, [and it] keeps people from having a level playing field,” she says. “I think it’s going to take a long time before it’s rectified.”

In the wake of the mayor’s race, *The (Charleston) Post and Courier* asked in a news story, “Could this become a new norm in South Carolina politics?” Indeed, that now seems likely. Primaries were held June 12, and this year every member of the S.C. House and Senate is up for re-election, along with the state’s six U.S. House members.

Previously, those “committee” reports would have been due April 10.

But now, “we’re not getting the reports,” said Sen. Hayes. “So we don’t know what money is being spent to influence who in their election bid — and we’ll never know.”

Indeed, “there may be a whole bunch of committees operating and pumping money into politics, buying ads, and hiring phone banks and operatives and so on, and we don’t know about that,” said John Crangle, a retired attorney and political science professor who has run the state chapter of Common Cause for 25 years.

Bopp did not respond to requests for comment, but said previously in a statement that the decision in the Wooten case meant that “once again, a federal court has ruled that government cannot regulate groups as political committees simply because they spend a certain amount on communications that mention candidates and their positions on issues.”

And not everyone thinks the situation here represents a crisis.

Phil Noble, president of the South Carolina New Democrats, who call themselves “modernizers in the progressive tradition,” said he isn’t sure the court ruling in question has made any “material difference” in the state.

He likened the ramifications of the judge’s decision and how groups have taken advantage of it to “a broken window in a train wreck,” because he feels campaign finance laws in the state were already too loose.

South Carolina earned a D- in political financing in the State Integrity Investigation, a March report by the Center for Public Integrity, Public Radio International and Global Integrity that graded states on their risk for corruption.

For her part, Hazelwood, the Ethics Commission lawyer, says there are likely still plenty of political hands in the state that haven’t yet grasped the

implications of the ruling or understood how to use it to their advantage.

Reform forecast: Mostly cloudy

In the wake of the Charleston mayoral race that drew attention to the implications of the Wooten decision, legislative leaders in the House and Senate said they would likely try to address it.

The president of the Senate at the time, Glenn McConnell, and House Speaker Bobby Harrell, both Charleston Republicans, said they wanted to be careful about violating an individual's right to free speech, according to *The Post and Courier*.

And the state's GOP governor, Nikki Haley, said, "It's finding that line between freedom of speech and letting people say what they need to say and also having disclosure so that people feel like they know who's behind it," the paper reported.

A variety of reform efforts have since been initiated in the state legislature, but ultimately, nothing has happened.

Among those efforts: a bill sponsored by GOP Sen. Hayes in February of 2011 that would have re-defined "committee" and put regulatory teeth back into the law. It would have done so by defining a committee as any group, organization, association or club that takes in or spends more than \$500 during an election cycle with a major purpose of supporting or opposing a candidate.

After sitting in the state's Senate Judiciary Committee for four months, the panel voted the legislation out favorably. Ten months later, on April 24 of this year, lawmakers debated the bill briefly on the Senate floor and approved amendments to the text by a vote of 31-5.

Because of the way the South Carolina Senate works, though, one senator has the ability to effectively stop legislation from moving. And a GOP senator, Lee Bright of Roebuck, did so in this case by objecting to the bill after it was amended.

Bright said in two recent phone conversations that he was too busy with the end of the session and his own re-election campaign to talk about the bill.

The root of the problem, said Democratic Senator Vincent Sheheen, was agreeing on language lawmakers felt the State Ethics Commission could enforce that wouldn't conflict with the federal court's decision to declare the "committee" definition unconstitutional.

Hayes said he will be re-introducing his bill when lawmakers reconvene in January as part of an omnibus ethics reform bill. But Sheheen for one sounds skeptical.

“In fairness to the Legislature, we can make an attempt to fix that problem,” he says. “But I think it’s an open question as to whether or not we can.”

For its part, the State Ethics Commission is likely finished trying to challenge court rulings that punch holes in the ethics laws it is tasked with enforcing. Bopp received more than \$225,000 in state taxpayer money for court fees in the ‘committee’ case and the agency itself spent at least \$150,000 trying to defend the law as it existed.

Says Hazelwood:

“I don't have the stomach for it anymore.”

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